

Who Should Be a Citizen of the Union? Toward an Autonomous European Union Citizenship

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European unification has transformed Westphalian states obsessed with 'power politics' (i.e., the ability to make war) and has institutionalised peace and harmonious cooperation among states, nations, regions, groups and individuals. European Union citizenship (Eurozenship thereafter) has made former enemies into associates and co-citizens and has enhanced the living standards of European societies, as well as the life options of Europeans. By so doing, it has changed people's understanding of what politics can do and who the 'co-citizens' are. States and their bureaucracies have had to adjust to the new context within which they have to operate.

This transformation is now met with resistance from nationalist forces and right-wing political parties in Europe. While it is true that nationalistic populism on both the right and the left of the political spectrum poses threats to the European Union edifice and, by praising the existence of 'hard' or 'harder' borders in an attempt to stem (increasing) human mobility, narrows political cooperation and hardens human relations, it, nevertheless, fails to convince. It presents neither an ideological programme nor a coherent solution to contemporary challenges. It is easy for elites to create collages of popular resentments and 'anti-s' in times of austerity, terrorist attacks and the mass exodus of people from war zones, and to arouse anti-migrant sentiments and other ugly passions among the population, but it is very difficult to maintain them. Time reveals the illusions and always exposes lies. And when political discourses and programmes become lies, they perish.

Refusing to believe that political constraints outweigh political possibilities in the present historical conjuncture, I argue that the time is ripe for the disentanglement of Eurozenship from Member State nationality. Since the mid-1990s I have defended this reform. But my argument for an autonomous Eurozenship in this debate unfolds in two steps which are presented in the subsequent two sections. In the first section, I explore the incremental disentanglement of EU citizenship from the nationality law of Member States, while in the second section I reconstruct Eurozenship, that is, I present the configuration of an autonomous EU citizenship law which can co-exist with EU citizenship cum Member State nationality.

Before going any further, however, a room must be made for a few remarks of a general kind. I should mention at the outset that I do not take issue with the broader debate about a federal future for the European Union and whether embarking upon the reconstruction of Eurozenship will threaten or weaken the salience of the Member States or their competence in this area. Nor is my discussion influenced by the intergovernmentalism v. supranationalism dilemma. In my view, this dualism underestimates the connectivity among overlapping layers of governance and their

dynamic relations. The European Union legal order does not begin where domestic law ends. Nor does it only occasionally rub off the boundaries of domestic legal orders which are self-contained and self-determined. Although the Brexit discourse and political negotiations resurrect the old-fashioned way of thinking about state sovereignty and control, one cannot but observe the difficulties of implementing in reality backwards looking notions of sovereignty.

Accordingly, my argument for an autonomous EU citizenship stems from the endogenous gaps, contradictions and tensions inherent in its present institutional form and the failure of the Member States to correct the hardship and unnecessary human suffering that these gaps and contradictions have created. If readers share this diagnosis, then they might agree with me that there is a duty on the part of the EU to step in and to correct malfunctions and deficits. The duty of European institutions derives from their role as upholders of the EU citizenship norm and the values of the EU (Article 2 TEU) and promoters of the well-being of its peoples (Article 3(1) TEU).

Step 1: The incremental relative autonomy of Eurozenship

Article 20 TFEU presents the link between Member State nationality and EU citizenship: 'every person holding the nationality of a Member State shall be a citizen of the Union'. The Member States have competence in determining nationality and the EU recognised and respected this for decades. When it became apparent that EU citizens were facing impediments in the exercise of the fundamental freedoms of free movement and residence, the Court of Justice of the EU ruled in 1992 that while the determination of nationality falls within the exclusive competence of the Member States, this competence must be exercised with due regard to the requirements of Community law.¹⁾Case C-369/90, *Micheletti and Others v. Delegacion del Gobierno en Catania* [1992] ECR I- 4329. Almost two decades later, when another EU citizen faced the misfortune of becoming stateless in Europe and thus losing his Eurozenship, Mr Rottmann, the Court had to become a 'reviewer of the regulatory choices' of the Member States.²⁾Case C-135/08, *Rottmann* [2010] ECR I-1449, para 48. The Grand Chamber then reiterated that the Member States have the power to determine the conditions for the acquisition and loss of nationality but, as far as EU citizens are concerned, the exercise of that power is amenable to judicial review in the light of EU law, particularly when the loss of the status of EU citizenship is at stake. Germany's withdrawal of Mr Rottmann's citizenship following a fraudulent naturalisation application which had resulted in the loss ex-lege of his Austrian citizenship rendered an EU citizen stateless and thus a non-EU citizen. But sadly, the Court remained silent on the issue of statelessness and the role that the EU could play in its elimination or diminution in the 21st century.

But why should statelessness lead to the loss of Eurozenship? Since the bond that European Union citizens have with the EU is a direct one, that is, they derive rights from the Treaties directly which are not contingent on the Member States'

approval, there is no reason to assume that in the absence of a Member State nationality Eurozenship should automatically vanish. And given that statelessness is an externality generated by states without the affected individuals' consent, protecting all those facing legal (de jure) or real (de facto) loss of nationality by allowing them to enjoy the protection of EU law and free movement would prevent rightlessness. Statelessness has a 'corrosive, soul-destroying' impact on the lives of all those affected'³⁾Leclerc and Colville, cited in J. Bradshaw, 'Stateless in Europe', in N. Ferreira and D. Kostakopoulou (eds.) *The Human Face of the EU* (Cambridge: Cambridge University Press, 2016), at 269. Mr Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, has urged states to take action; 'No one should have to be stateless in today's Europe', 9 June 2008, Human Rights in Europe: Time to Honour our Pledges (Council of Europe, 2008). and its avoidance has been elevated into an international norm.⁴⁾European Convention on Nationality [1997] ETS 166; The Convention on the Reduction of Stateless persons [1961] UN Treaty Series 989. This coupled with the EU citizenship norm could justify the EU's intervention.

Additionally, there are other types of denationalisation or loss of citizenship for a variety of reasons. Acquisition of nationality can result in the automatic loss or withdrawal of one's original nationality and, in certain Member States, long-term residence abroad results in loss of citizenship. If a dual national has a third-country nationality in addition to an EU nationality, long-term residence abroad will result in his/her dis-identification as an EU citizen.⁵⁾Case C-221/17, *Tjebbes and others*, pending. Furthermore, states often reclassify individuals, create various nationality categories, make it difficult for people to obtain passports and adopt legislation authorising the revocation of citizenship thereby divesting people of Eurozenship.⁶⁾The reader may recall the legislative reforms in Estonia and Latvia in 2004 and the 18.000 'erased' permanent residents in Slovenia. I am grateful to Johanna Hasse for highlighting the situation of 214.000 non-citizens of Latvia who have not attained Latvian citizenship post-independence. Ms Veronia Corcodel also pinpointed the de facto denationalisation of Moldovans, who were given Romanian passports as minors, by Romanian authorities prior to the adoption of legislation in 2017. Such decisions shatter individuals' lives and affect 'the nature and consequences' of Eurozenship. As such, they should be able to trigger its relatively autonomous application.

Brexit and the likelihood of mass deprivation of Eurozenship rights, including those of 1.2 million UK nationals living in EU Member States, highlight the need for a reform. More than one million UK nationals who have activated their fundamental right to free movement and residence will be deprived of their EU rights without their consent owing to the (slim) majority's preference for the UK 'taking back control', whatever this might mean, and thus leaving the European Union. From a normative as well as democratic (I believe the principle of majority rule does not have an unlimited scope in constitutional democracies: it excludes the power to alter rights and fundamental freedoms or to deprive numerical minorities of their rights) point of view, this is quite problematic. Equally problematic is any state-induced de-citizenisation. So, when

individuals' EU citizenship status is at risk owing to national authorities' decisions to withdraw nationality, one can imagine a reformed Article 20 TFEU stating:

'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. However, loss or absence of a Member State nationality would not automatically result in the forfeiture of Union citizenship, if the loss of EU citizenship is at stake'.

The insertion of the last sentence in Article 20(1) TFEU stems from the *effet utile* of European Union law (the principle of effectiveness) and the fundamental status of Eurozenship in the Union legal order. It does not limit the Member States' competence in the determination of nationality, but it recognises the relative autonomy of Eurozenship when its loss is at stake.

Step 2: Belonging in the EU and an Autonomous EU Citizenship

If one is not afraid of radicalism, he or she could contemplate an autonomous Eurozenship. Unlike the option outlined above in relation to 'de-citizenisation' cases, an autonomous EU citizenship would encompass access and require the adoption of rules on independent access to it. Member States have no reason to resist it because there is no competence encroachment: the provision *'every person holding the nationality of a Member State shall be a citizen of the Union'* would continue to apply. But it would have to be complemented with a disjunctive clause: *'every person holding the nationality of a Member State or declared as an EU citizen shall be a citizen of the Union'*.

The category of persons 'declared as EU citizens' is intentionally broad to include any class of persons connected with the EU. Such a reform adds nothing to Eurozenship cum Member State nationality and it is not inconsistent with it. What it means is that the EU would also have the power to make an independent determination of the EU's citizenry. In other words, Eurozenship would be co-determined. Notably, a variant of such a reform has been advocated since the establishment of Union citizenship by the Treaty on European Union (in force on 1 November 1993); civil society organisations, academics and policy practitioners have argued for the possibility of grounding Eurozenship on domicile in the territory of the Union.⁷⁾ It was suggested by the European Union's Migrants Forum in its proposals for the revision of the TEU at the 1996 IGC. For early normative justifications of this policy option, see D. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe', (1996) 4(4) *Journal of Political Philosophy* 337–358 and R. Rubio-Marin and J. Monar's contributions in M. La Torre (ed.) *European Citizenship: An Institutional Challenge* (Kluwer, 1998).

Conditioning EU citizenship on domicile for a period of five years in the territory of the Union would make the social fact of community membership a true determinant of belonging, end the exclusion of c. twenty million long-term resident third-country nationals, and remedy the lack of uniformity in the application of EU law owing

to differing naturalisation requirements in the various Member States. In sum, it would bring about normative coherence, legal certainty and simplified, principled membership rules in the Euro-polity. It would also supplement the Member States' efforts to respond to internal diversity in an effective manner.

In addition to including long-term resident third-country nationals in the EU, an autonomous EU citizenship would also ensure that all children born in the EU, who might not be able to inherit a Member State nationality, would automatically be EU citizens. In this way, they would be able to participate in European societies as equals and to benefit from the EU internal mobility rules. Belonging to the EU would be a practice⁸⁾ Antje Wiener, *Building Institutions: The Developing Practice of European Citizenship* (Oxford: Westview, 1998); E. Isin and M. Saward, *Acts of Citizenship* (Cambridge: Cambridge University Press, 2014). and a feeling of being included and taking part as a respected and equal member in a political community of law, democracy and human rights.

Residence or domicile, regardless of nationality, would be the main criterion for the acquisition of EU citizenship. There is hardly any need for EU institutions to reinvent the wheel for the implementation of this criterion because EU law has made five-year periods significant for a number of rights and freedoms enjoyed by third-country nationals (Dir. 2003/109) and for the acquisition of permanent resident EU citizen status (Dir. 2004/38). The question that remains is whether the EU would have to adopt additional requirements by designing a European Union naturalisation regime. Here, I would like to suggest caution. Naturalisation law and policy have a specific historical pedigree and justification that do not necessarily fit with a political community based on law and political principles, such as the European Union. And although it would not be in the interest of any political community to offer citizenship to all those who have committed human rights violations, apart from above mentioned residence-based criterion and the absence of convictions for serious crimes, I would not suggest the adoption of other naturalisation requirements, such as participating in civic integration courses, linguistic competence tests, oaths and so on.⁹⁾ For the opposite view, see D. O'Keeffe, 'Union Citizenship', in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (West Sussex: Wiley, 1994), 87-107. My reservations were noted in 'European Citizenship and Immigration After Amsterdam: Openings, Silences, Paradoxes', *Journal of Ethnic and Migration Studies*, Vol. 24 (4), October 1998, 639-656, at 646-7. Designing a Euro-naturalisation regime would make Eurozenship resemble national citizenship and, at the same time, fuel national sensitivities and fears about the latter's replacement by the former in the future.

UK nationals affected by Brexit could opt for this mode of autonomous Eurozenship. Highly skilled third-country nationals, who view the acquisition of national citizenship either via the normal route or by investment as a means of having access to the European internal space, would also find this option attractive. For them, it could be that national membership is only instrumental: entry into geographically bounded Member States opens the gate for entry into the European Union space and territory. Accordingly, the EU would provide the basis for an inclusive concept and practice of Eurozenship for third-country nationals, be they UK nationals qua former EU

citizens (if Brexit takes place), long-term residents in the EU, or newcomers who regard Eurozenship as inherently valuable. Such an inclusive Eurozenship would not interfere with national legislation. It would simply mean that the Member States would no longer have the exclusive privilege of granting Eurozenship.

By escaping state management and the imposed link with state nationality, Eurozenship would be reclaimed as the cornerstone of European integration and of a community which allows all its inhabitants to engage as equals in shaping the institutions and laws that govern them. Allowing the Member states to retain their definitional monopoly over nationality but ending their definitional monopoly over EU citizenship and thus giving European institutions a say in determining the EU's citizenry would signal the emergence of a progressive and humane EU citizenship law for the EU's constituent demoi.

References

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- 2. Case C-135/08, Rottmann [2010] ECR I-1449, para 48.
- 3. Leclerc and Colville, cited in J. Bradshaw, 'Stateless in Europe', in N. Ferreira and D. Kostakopoulou (eds.) *The Human Face of the EU* (Cambridge: Cambridge University Press, 2016), at 269. Mr Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, has urged states to take action; 'No one should have to be stateless in today's Europe', 9 June 2008, Human Rights in Europe: Time to Honour our Pledges (Council of Europe, 2008).
- 4. European Convention on Nationality [1997] ETS 166; The Convention on the Reduction of Stateless persons [1961] UN Treaty Series 989.
- 5. Case C-221/17, Tjebbes and others, pending.
- 6. The reader may recall the legislative reforms in Estonia and Latvia in 2004 and the 18.000 'erased' permanent residents in Slovenia. I am grateful to Johanna Hasse for highlighting the situation of 214.000 non-citizens of Latvia who have not attained Latvian citizenship post-independence. Ms Veronia Corcodel also pinpointed the de facto denationalisation of Moldovans, who were given Romanian passports as minors, by Romanian authorities prior to the adoption of legislation in 2017.
- 7. It was suggested by the European Union's Migrants Forum in its proposals for the revision of the TEU at the 1996 IGC. For early normative justifications of this policy option, see D. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe', (1996) 4(4) *Journal of Political Philosophy* 337–358 and R. Rubio-Marin and J. Monar's contributions in M. La Torre (ed.) *European Citizenship: An Institutional Challenge* (Kluwer, 1998).
- 8. Antje Wiener, *Building Institutions: The Developing Practice of European Citizenship* (Oxford: Westview, 1998); E. Isin and M. Saward, *Acts of Citizenship* (Cambridge: Cambridge University Press, 2014).
- 9. For the opposite view, see D. O'Keeffe, 'Union Citizenship', in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (West Sussex:

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